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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 40

JAMES CONWAY,
Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, *et al.*,
Respondents.

On Writ of Certiorari to the Honorable Richard H. Chambers, Chief Judge of the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The order of the United States District Court for the Northern District of California denying petitioner's amended petition for a writ of habeas corpus, which is unreported, appears in the Appendix (hereinafter cited as A.), at 20. The order of Chief Judge Chambers, treating a document filed by petitioner as a petition for certificate of probable cause to appeal the denial of the petition for writ of habeas corpus,

and denying the same, is also unreported, and appears at A. 27.

JURISDICTION

Jurisdiction of the District Court was conferred by 28 U.S.C. section 2241(c)(3). Jurisdiction of the Court of Appeals was sought to be invoked under 28 U.S.C. sections 1291 and 2253. In point of fact, the Court of Appeals was without jurisdiction to take any action in the matter because of the lack of a timely filing of a notice of appeal or its equivalent. The jurisdiction of this Court rests upon 28 U.S.C. section 1651(a), to review, in this case, the denial of an application for a certificate of probable cause. The order of Chief Judge Richard H. Chambers denying the same was entered on February 7, 1968 (A. 27). The petition for writ of certiorari was filed in this Court on May 6, 1968, and was granted on January 27, 1969 (A. 28).

QUESTIONS PRESENTED

1. Did Judge Chambers have jurisdiction to entertain an untimely application for a certificate of probable cause?

2. If so, did he abuse his discretion in denying the certificate?

   A. Does a demonstrably false allegation that a state prisoner's term was refixed without cause or hearing state grounds for relief on habeas corpus?

B. Does the Fifth Amendment protection against double jeopardy bar redetermination of a prison term tentatively fixed under an indeterminate sentence law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States. This case also involves California Penal Code sections 213, 671, 1168, and 3020, all of which have been set out verbatim on pages 3 through 5 of the Brief for Petitioner, and need not be repeated here.

STATEMENT

Petitioner was convicted in the Superior Court of Kern County, California, on two counts of violating California Penal Code section 211 (first degree robbery). On March 5, 1952, petitioner was sentenced to state prison for the term prescribed by law (see Cal. Pen. Code § 1168), the sentences to run consecutively (A. 8). As petitioner has analyzed in some detail (Brief for Petitioner 5-6), the effect of this sentence was to impose two consecutive sentences of 5 years to life, with discretion in the California Adult Authority to determine whether petitioner would be discharged from custody prior to the expiration of the life terms.

On January 29, 1959, after a hearing, the Adult Authority tentatively fixed petitioner's prison terms at 5 years on each count. Absent further action on the part of the Authority, petitioner's term would have expired on March 14, 1962. Subsequent to June 15, 1961, the Adult Authority, after a hearing, rescinded its prior action fixing petitioner's terms. The effect of this decision was to return petitioner to the status of a life prisoner.

The foregoing facts, as stated in petitioner's petition for habeas corpus in the District Court, are correct. The petition below also contained certain demonstrably false allegations. The petition and its 76-page addendum (only a small portion of which appears in the Appendix) presented the questions of whether the California indeterminate sentence law was unconstitutionally vague, whether California law permitted the refixing of petitioner's term after the first of his consecutive sentences had allegedly expired, and whether his term could be redetermined "for no cause." (A. 15-16). In a footnote (A. 14-15), petitioner made certain factual allegations which his counsel interprets in the Brief for Petitioner substantially as follows: for a year or more prior to his appearance before the Adult Authority in June of 1961, he had had no disciplinary actions for violation of prison rules filed against him. When he told the Authority panel members that he wished to return to the place of his conviction and fight his case, the members of the panel expressed the intention of increasing his term. Petitioner now contends that these

allegations raise the claim that his term was refixed without cause or for an invalid cause, and without notice, hearing, and the opportunity to present evidence.

In point of fact, however, petitioner's term was refixed for engaging in a fight with another prisoner, a violation of prison rules, after a hearing at which he appeared, and of which he was duly notified. Attached herewith, marked "Exhibit A," "Exhibit B," and "Exhibit C," and incorporated herein by reference, are copies of various records of the Adult Authority relating to petitioner's case. Exhibit A is a copy of California Department of Corrections form 263 entitled "Notice of Complaint." Addressed to petitioner, the notice informed him that a written complaint had been filed against him on a charge of violating Director of Corrections Rule D-1201 ("Inmate's Behavior"), informed him of the date on which a hearing would be held, and advised him that the Authority or its disciplinary committee would conduct a hearing to determine his guilt or innocence, and to make, "when applicable," a determination regarding the refixing of his term.[1] Petitioner's receipt of the notice of hearing is acknowledged by his signature. "Exhibit B" is a copy of the charge, plea, findings and disposition, which details the offense and

[1]The form actually refers to three possible actions: revocation of parole, "forfeiture of credits," and refixing of term. Since petitioner was not on parole, and not subject to forfeiture of credits, having been received by the Department of Corrections subsequent to January 1, 1948, see California Penal Code sections 2293 and 2926, but had had his term fixed, only the refixing of term was a possible course of action in his case.

the explanation offered by petitioner. He was found guilty. Refixing of his term followed some six months later.[2]

Unfortunately, the true facts regarding the circumstances under which petitioner's term was refixed were never brought to the attention of the courts below. The district Court denied the petition on its face and without issuing an order to show cause. Consequently, we did not respond to it.[3] For that matter, we have no record of even being served with petitioner's original petition for writ of habeas corpus, and to this date do not have a copy of the same except to the extent that it is printed in the Appendix.

On August 24, 1967, the petition was denied on the ground that it failed to name the proper party as respondent, did not contain a brief, concise statement of the pertinent facts, and did not indicate that a copy of the 76-page addendum had been served upon the Attorney General of California. Leave to

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[2]During the period in question, it was the policy of the Adult Authority, following the imposition of disciplinary action, and upon recommendation of the Disciplinary Committee, to postpone the inmate's next appearance before the Authority to the sixth month following the infraction. This procedure was followed in the instant case. Attached hereto, marked "Exhibit D," and incorporated herein by reference is a copy of an excerpt from the minutes of a meeting of the Adult Authority held on December 29, 1960, ordering the postponement of petitioner's next calendar appearance. The actual rescission of the order fixing petitioner's term took place on July 10, 1961.

[3]Because the vast majority of habeas corpus petitions filed by state prisoners in state and federal courts are frivolous, it is the policy of the Attorney General of California normally to make no response to them, nor even to submit them to an attorney for evaluation, unless the court in which a particular petition is filed makes some sort of request for response, such as by issuing an order to show cause why the writ should not be granted.

amend was granted. (A. 17). Petitioner amended his petition, and the amended petition was denied by the District Court on September 27, 1967. (A. 20). A petition for certificate of probable cause was filed October 10, 1967 (A. 21), and denied by the District Court on October 31, 1967 (A. 23).

The next document filed in any court was one entitled "Affidavit of James Conway," which was dated December 10, 1967, and received by the Clerk of the United States Court of Appeals for the Ninth Circuit on December 14, 1967 (A. 24-26). The affidavit was treated by Chief Judge Chambers of that court as an application to him for a certificate of probable cause, and denied for the reasons expressed by the District Court in its orders, on February 7, 1968 (A. 27).

SUMMARY OF ARGUMENT

Judge Chambers cannot be said to have abused his discretion in denying a certificate of probable cause to appeal from the order denying the petition for writ of habeas corpus, as he had no jurisdiction to entertain the application for such certificate, the same having been untimely filed. Notice of appeal must be filed within thirty days of the entry of the final judgment, except under certain circumstances not pertinent here. This rule applies to habeas corpus cases. Where a certificate of probable cause to appeal denial of a petition for habeas corpus is denied by the District Court, the petitioner's only remedy is to apply

to the Court of Appeals for the issuance of such a certificate. Such an application, in order to be treated as a notice of appeal, must be filed within the time allotted for filing a notice of appeal—in this case, thirty days. The record fails to show that petitioner either filed or attempted to file any document at all with the Court of Appeals during the thirty-day period following the denial by the District Court of his application for certificate of probable cause. Judge Chambers was therefore without jurisdiction to entertain the application.

There was no abuse of discretion in denying the application for certificate of probable cause for the further reason that the original petition for writ of habeas corpus failed to state facts raising a substantial federal question. The factual allegations of the petition to the effect that petitioner's term was refixed for no reason or for an invalid reason, and without notice and a hearing, are false, and their falsity is demonstrated by documentary evidence reprinted in this brief. Petitioner has hypothesized a system under which the California Adult Authority redetermines prison terms without notice and hearing, and may do so arbitrarily or for no constitutionally valid reason. In actuality, the California Adult Authority refixes terms only for good cause and only after notice and hearing. Furthermore, in petitioner's particular case, his term was refixed for a good cause after proper notice and hearing. We have no significant interest in defending a procedural system which does not exist other than in the imagination of petitioner,

or in defending the proposition that clearly fabricated factual contentions fail to state a cause of action. Petitioner is, in effect, asking for an advisory opinion upon a hypothetical set of facts. Just as it is not this Court's function to issue such opinions, it is not our function to participate in a charade in which fabrications are deemed to be true for purposes of considering legal issues having no bearing on reality.

Nonetheless, we welcome the opportunity to reassert the proposition that the United States Constitution does not govern the action of a parole board in determining and redetermining, on a tentative basis, whether a state prisoner will be granted release prior to the expiration of his maximum term under a state indeterminate sentence law. Under California law, all actions fixing prison terms are tentative and may be reconsidered at any time. A fixed term is automatically refixed at maximum upon the suspension or revocation of parole, and may be refixed at other times for cause. Because of the purely tentative nature of an order fixing term, such an order confers on a prisoner no vested right whatever to the term as so fixed. Assuming, *arguendo*, that actual release on parole confers upon a parolee a vested right to liberty which may not be taken away without cause, notice, and hearing, where, as here, no actual release even on parole has taken place, the authorities are uniform to the effect that reconsideration of a tentative decision to enlarge a prisoner at some future date is not subject to procedural requirements under the federal constitution.

Petitioner's claim that the federal constitutional protections against double jeopardy bar redetermination of a term tentatively fixed by a parole board is without merit. Granting that double jeopardy prohibits the increase, after commencement of service, of a judicially fixed sentence intended to be rigid, it has no application to the reconsideration of an administrative decision made some years after a judicial proceeding, and known by all parties to be purely tentative, to release a prisoner from custody after a stated time, should nothing occur prior to the expiration of that time to warrant reconsideration. This Court has recently held that the double jeopardy provisions of the Fifth Amendment, as applied to the states, present no bar to the imposition, upon retrial following reversal or vacation of a conviction, of a greater sentence than that originally pronounced. Such greater sentence need be justified only by objective facts not known at the time of the original sentence imposition, such as the defendant's prison record while serving the original sentence. *A fortiori*, a parole board may redetermine, upon the basis of an inmate's prison record, his sentence, once tentatively fixed.

ARGUMENT

I

JUDGE CHAMBERS LACKED JURISDICTION TO ENTERTAIN THE APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE, AS NEITHER IT NOR ANY OTHER DOCUMENT WAS FILED IN THE COURT OF APPEALS WITHIN THIRTY DAYS OF THE ORDER OF THE DISTRICT COURT DENYING A CERTIFICATE OF PROBABLE CAUSE.

In exercising its jurisdiction under the all writs statute, 28 U.S.C. section 1651(a), to review the denial by a Court of Appeals or judge thereof of a certificate of probable cause to appeal from an order denying a petition for writ of habeas corpus, the first question which this Court must answer is whether the refusal to issue a certificate of probable cause constituted an abuse of discretion. *House v. Mayo*, 324 U.S. 42 (1945). Obviously, this question must be answered in the negative if the Court of Appeals or a judge thereof lacked jurisdiction to entertain the application for a certificate of probable cause or if, had the certificate issued, the Court of Appeals would have lacked jurisdiction to hear the appeal on its merits. In the instant case, because there was no timely filing of a notice of appeal or equivalent thereof, the jurisdiction of the Court of Appeals to act lapsed prior to the execution and filing of the document treated by Judge Chambers as an application for certificate of probable cause.

With certain exceptions not pertinent here,[1] notice of appeal from a judgment or order must be filed

[1] The exceptions are suits in admiralty, bankruptcy matters, or matters in which the United States or an officer or agency thereof is a party.

within thirty days of its issuance. 28 U.S.C. § 2107. This rule applies to habeas corpus cases, even though the petitioner is not represented by counsel, *Kupsalis v. Wilson,* 380 F.2d 365 (9th Cir.), *cert. denied,* 389 U.S. 878 (1967). A complication in the administration of this rule arises by virtue of the fact that an appeal may not be taken to the Court of Appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a state court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause. 28 U.S.C. § 2253. The courts have been extremely liberal in cases where a habeas corpus applicant is not represented by counsel in accepting informal documents as notices of appeal. *Lawrence v. Wainwright,* 401 F.2d 177 (5th Cir. 1968). Accordingly, it is generally accepted that an application to the District Court for a certificate of probable cause may be made within the thirty-day period, and that if it is made within such period, an order denying the application starts anew the running of the thirty-day period for filing notice of appeal. However, a notice of appeal sent to the District Court will not be filed unless a certificate of probable cause has been issued. Accordingly, where a District Court has denied such a certificate, the petitioner's only remedy is to seek issuance of the same from a circuit justice or judge. We assume, *arguendo,* that if such an application for a certificate of probable cause is made to a circuit justice or judge within the thirty-day period, and granted, the application may be

treated as a notice of appeal which would confer jurisdiction upon the Court of Appeals to hear the appeal.

However, a policy of extreme liberality in treating formal or informal documents as equivalent to a notice of appeal "does not override the requirement that notice of appeal must be filed within 30 days. . . ." *Lawrence v. Wainwright, supra.* Thus, even under the statutory interpretations most liberally favoring the right of appeal on behalf of habeas corpus petitioners, a bedrock requirement of appellate jurisdiction is that either a notice of appeal be filed within thirty days of the issuance of an order by the District Court granting a certificate of probable cause, or that some document evidencing a desire to appeal be filed with the Court of Appeals, a judge thereof, or a circuit justice, within thirty days of the issuance of an order denying a certificate of probable cause. In the instant case, the District Court denied petitioner's amended petition on September 27, 1967, and denied his application for a certificate of probable cause on October 31, 1967. Nothing whatever was filed in the Court of Appeals until December 14, 1967, some forty-four days after the final order of the District Court.[5]

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[5]The document filed on December 14, 1967, entitled "Affidavit of James Conway," contains certain factual allegations which, of course, establish nothing. It was alleged that on November 17, 1967, petitioner filed a notice of appeal with the District Court, together with payment of the filing fee, but that the Clerk of the District Court refused to accept it. It was also alleged that petitioner thereafter sought to file in the Court of Appeals a petition for writ of mandate (A. 24-26). However, the date on which he allegedly sought to file such a petition is not given in the affidavit, there

While 28 U.S.C. section 2107 provides that the time for filing notice of appeal may be extended to 60 days by order of the District Court based upon a showing of excusable neglect because of failure of a party to learn of the entry of the order, in this case there was no such extension, and none was applied for. Nor is there an indication that grounds for such extension existed, for if appellant's affidavit is correct, he did in fact learn of entry of the judgment prior to November 17, 1967, well within the thirty-day period. The document which was filed carries a date of December 10, 1967, or 40 days following the issuance of the District Court's final order. Thus, nothing showing a desire to appeal was filed with the Court of Appeals during the thirty-day statutory period. Therefore, neither Judge Chambers, the entire court, nor a circuit justice had jurisdiction to issue a certificate of probable cause at the time the alleged application therefor was filed. Had a certificate been granted, the appeal would have had to be dismissed when the lack of jurisdiction came to the attention of the court. *Poe v. Gladden*, 287 F.2d 249 (9th Cir. 1961). *Accord, Kapsalis v. Wilson, supra.* Under these circumstances, any certificate of probable cause issued by Judge Chambers or another circuit judge or circuit justice would have been a nullity. Therefore, there can be no claim that Judge Chambers abused his discretion in refusing to issue the certificate.

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being only an indication that it was prior to December 8, 1967. This does not constitute even an allegation that an attempt to file a document with the Court of Appeals was made on or prior to November 30, 1967, the last day for filing a notice of appeal or its equivalent.

It should be noted that the fact that petitioner's opportunity to appeal was lost through lapse of time does not by any means necessarily foreclose the eventual determination by a federal court of the claims he presented to the District Court below. Under 28 U.S.C. section 2244(b), a federal court has discretion to decline to entertain a petition for writ of habeas corpus after a hearing on the merits of an issue of law in a previous application for writ of habeas corpus in federal court resulted in a denial of relief, unless the applicant did not on the earlier petition abuse the writ. However, the District Court does have discretion to entertain the application. In the instant case, if petitioner were to make a subsequent application for a writ of habeas corpus to the District Court alleging the same grounds as he alleged in the instant petition, and if he were to show that he was denied the opportunity to appeal from the denial of the petition in the instant case because of ignorance of the procedures for obtaining a certificate of probable cause from a circuit judge or justice after the denial of same by the District Court, he may very well be able to convince the judge hearing the new application that he should exercise his discretion to entertain it. It is even at least arguable that the judge would be required to conclude that appellant had not "abused the writ" in the instant case, and would therefore be required to entertain the new petition.

II

PETITIONER'S FACTUAL ALLEGATIONS THAT HIS TERM WAS REFIXED WITHOUT CAUSE OR HEARING ARE DEMONSTRABLY FALSE; EVEN IF TRUE, HOWEVER, THEY DO NOT STATE GROUNDS FOR RELIEF.

A. The California Adult Authority refixes terms only for good cause and upon hearing after notice.

Petitioner has very helpfully set out "the statutory scheme of the California indeterminate sentence law," Brief for Petitioner 12-16, in which he points out that the California statutes at first permitted no refixing of a sentence once fixed, were amended to permit refixing of sentences for particular reasons and only after notice and a hearing, and were subsequently amended in 1941 to delete the specific bases for revoking a prior determination of sentence and the requirements of notice and hearing. He calls attention to cases of the California Supreme Court, *In re McLain*, 55 Cal.2d 78, 87, 357 P.2d 1086, 9 Cal.Rptr. 824 (1960) and *Ex parte Smith*, 33 Cal.2d 797, 205 P.2d 662 (1949), holding that while prison terms could not be redetermined without cause, there was neither a constitutional nor statutory requirement of notice and hearing prior to such redetermination.

Petitioner naturally assumes that because the law does not require the California Adult Authority to give notice and hearing prior to redetermination of a prison sentence, the Authority does not do so, and bases his argument on the premise that notice and hearing are constitutionally required procedural requisites to a valid redetermination of term. His factual premise, however, is unsound. The California

Adult Authority has a firm policy of rescinding the fixing of a term, revoking parole, or ordering forfeiture of credits only after a hearing, preceded by notice to the inmate of the charges against him, at which he is allowed personally to appear and to present evidence in his behalf.

Attached herewith, marked "Exhibit E," and incorporated herein by reference is a copy of Adult Authority Resolution No. 216. This resolution sets out a procedure for reporting inmate infractions of prison rules to the Authority for appropriate consideration and action. The reporting of a disciplinary action to the Authority takes place only after the inmate has been given a hearing at which he has pleaded guilty to the charge or been found guilty of the violation. Notice of the hearing and the charges against him are given the inmate by serving upon him a copy of California Department of Corrections form 263.[6] This form is the one used in "Exhibit A" herein. Form 263 also warns the inmate that the hearing may result in a redetermination of his prison term, if the same has been fixed, or revocation of parole or forfeiture of credits, where appropriate. Thus, an inmate charged with an infraction of prison rules is notified of the rule he is charged of violating, the time of the hearing on those charges, and their possible consequences to him. At the hearing, he is given an

[6]California Department of Corrections Administrative Manual, Paragraph 320.05012, provides:

"'CDC' Form 263, NOTICE OF COMPLAINT, will be prepared in duplicate on each case referred to the Disciplinary Committee in accordance with Par. 225.02, Administrative Manual."

opportunity to present evidence in his own behalf. In addition, Resolution No. 216 contains the following paragraph:

> "Normally, the Adult Authority will not take any final Determinative Action rescinding either a parole date or a term fixed unless the respective inmate has been given a personal appearance hearing by a panel of the Adult Authority."

B. Petitioner's term was refixed after he was found guilty of violating prison rules (fighting with another inmate) at a hearing which he attended following notice of which he acknowledged receipt.

Petitioner's entire factual premise—that his term was refixed without notice and hearing and either for no cause or for a constitutionally insufficient cause—is wholly false. "Exhibit A" shows that he was served with, and acknowledged receipt of by his signature, a notice of complaint charging that he

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We do not mean to imply that this resolution governs petitioner's case, for it was adopted in its present form on June 5, 1964, some three years after the date in question. We cite it only to apprise the Court of the present practices of the Adult Authority. Attached hereto, marked "Exhibit F," and incorporated herein by reference as a copy of Adult Authority Resolution No. 216-A, adopted May 11, 1956, and in force as of the date on which the Authority refixed petitioner's term. The language of this resolution is similar to that of the subsequently adopted Resolution No. 216, but it does not state that the Adult Authority normally will not refix a term without giving the inmate a personal appearance hearing by a panel of the Authority. However, it was the policy of the Authority nonetheless to grant such hearings, and furthermore, petitioner does not deny receiving such a hearing by the Authority prior to rescission of its earlier order fixing his term. Moreover, Resolution No. 216-A, in effect at the relevant times in question, provided for a recitation in the minutes of the Adult Authority that the action taken thereon was pursuant to a report of the Disciplinary Committee regarding the inmate's violation of prison rules, as determined by a hearing following notice in the form of service of a written copy of the charge upon the inmate.

had violated Director of Corrections Rule D-1201, governing inmate behavior, informing him of the time and place at which a hearing would be held; and apprising him of possible consequences flowing from such hearing—in this case, the retixing of term. "Exhibit B" shows that he attended the hearing, details the charges of fighting with another inmate, notes that petitioner pleaded not guilty and offered an explanation of his conduct, and notes further that he was found guilty and given a sentence of three days in isolation, with a recommendation that his Adult Authority appearance be postponed to June of 1961. "Exhibit C" is the formal statement of the Disciplinary Committee's recommendations and subsequent Adult Authority action. There can thus be no question but that petitioner was actually afforded all of the procedural requirements—notice, hearing, and retixing of term only for cause—to which he now claims the United States Constitution entitles him.

We realize that in the procedural posture of the instant case, there having been no opportunity below to dispute petitioner's factual contentions, these contentions must technically be taken as true. However, we have brought the falsity of these contentions to the attention of the court in order to point up the fact that we have little or no interest in defending the proposition that his claims, if true, do not state grounds for relief. We do not wish to be placed in the position of attempting to defend procedures of the Adult Authority which exist only in petitioner's imagination. Nor have we significant interest in opposing the proposition that petitioner's factual con-

tentions, if true, state grounds for relief, since the contentions are not true and could have been so proved had we been given the opportunity to oppose the petition below.

The procedures utilized by the California Adult Authority easily withstand the constitutional assaults leveled upon them by petitioner, simply because they actually fulfill his ideas of constitutional requisites. If this Court were to accept as true the fanciful allegations that the California Adult Authority rescinds orders fixing prison terms without cause, notice, or hearing, it would render an advisory opinion as to the constitutionality of a procedural system having no relationship to reality. If we were to accept these contentions as true, for the purpose of aiding this Court in preparing such an advisory opinion, we would be acting out a mere charade. We find utterly pointless a discussion of the constitutional validity of hypothetical procedures.

We can see no point in this Court's passing upon the constitutionality of the procedures which petitioner hypothesizes. This Court could make no constitutional determination of current or past relevance to the law of California. Even if the documentary evidence which we have tendered, and which demonstrates that full procedural guarantees were afforded petitioner, may not for purposes of the instant proceeding be accepted as true or dispositive, his contentions boil down to the factual claim that the proper procedures were not followed in his particular case. This is an individual claim, raised for his benefit

alone, and can have no implications for other California prisoners. Since this Court does not sit for the benefit of particular litigants, *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), we suggest that this Court should not consider the arguments raised in Part I of the Brief for Petitioner.

C. Even if petitioner had not been given notice and a hearing, refixing his term would raise no federal question

In support of the District Court and Judge Chambers, we have no hesitation in asserting, and asking this Court to adopt, the broader proposition that the action of the California Adult Authority in refixing a prison term tentatively determined under the California indeterminate sentence law, prior to any release on parole or otherwise, raises no question under the United States Constitution. In so arguing, however, we are obliged to sweep away some of the misconceptions concerning the California indeterminate sentence law which could arise from a reading of the Brief for Petitioner.

Petitioner correctly notes decisions of this Court, particularly *Townsend v. Burke*, 334 U.S. 736 (1948), and *Hyser v. Reed*, 318 U.S. 954 (1943), which hold that due process applies to sentencing. In support of his proposition that due process governs the refixing of terms by the California Adult Authority, he attempts to establish the premise that the Adult Authority, rather than the judge, assumes for certain criminal purposes the actual sentencing function. It is true that when a judge has exercised his discretion to sentence a convicted felon to state prison for the

term prescribed by law, the actual length and conditions of the felon's incarceration are determined, in most cases,[3] by the Adult Authority. However, there reposes a very considerable discretion in the trial judge as to the proper penalty to be meted out to a convicted felon, and the exercise of this discretion constitutes the true sentencing for constitutional purposes.

Of the 34,683 persons convicted of felonies in California superior courts in 1967, all of which were eligible for commitment to the Department of Corrections "for the term prescribed by law," only 5,990, or 17.3 percent, were actually committed to the Department of Corrections. Of the remainder, 58.7 percent were given probation, 12.5 percent were given county jail terms, and 11.5 percent were given other dispositions, including fines, commitments to the California Youth Authority, and civil commitments to the California Rehabilitation Center (for narcotics addicts) and the Department of Mental Hygiene (for mentally disordered sex offenders). State of California, Department of Justice, Division of Law enforcement, Bureau of Criminal Statistics, Crime and Delinquency in California 1967, 145. The foregoing statistics illustrate the breadth of the trial judge's sentencing discretion. The judge may always, at least theoretically, place a convicted felon on probation (though if the conviction is for one of the most serious crimes, he may grant probation only in unusual cases and with the concur-

[3] In some circumstances the sentencing court may recall and resentence a committed felon. Cal. Pen. Code § 1168.

rence of the District Attorney, see Cal. Pen. Code § 1203). Determination of whether a prison sentence is warranted is the true sentencing function. And when this function is exercised, the requirements of due process, of course, apply.

When a convicted felon has been sentenced to state prison "for the term prescribed by law" he has, in effect, been sentenced to prison for the maximum term prescribed by the statute under which he was convicted. The Adult Authority has only two powers: to release the inmate on parole, thereby conferring upon him substantial liberty but nonetheless retaining him in custody, *Jones v. Cunningham*, 371 U.S. 236 (1963); or, by "fixing his term" at less than maximum allowing the termination of even parole supervision at a point in time prior to the expiration of the maximum term. Until and unless the Authority chooses to take one or both of these actions, a prisoner will remain in state prison for the maximum term prescribed by law for the offense of which he was convicted. The Adult Authority has no obligation whatsoever either to grant parole or to fix or refix a prison term. Moreover, when the Authority reduces a maximum sentence, its action, in the very nature of things, is tentative and may be changed for cause. Such procedure presents no federal question. *In re Harris*, supra, 69 Cal.2d at 85, 367 P.2d 1000, 9 Cal. Rptr. 824 (1968). The purely tentative nature of any term fixed at less than maximum means that it is conditioned upon continued good behavior on the part of the inmate, and the absence of any cause for it to

consideration. The Adult Authority has no power to bind itself to the maintenance of a term once fixed, and a term becomes permanently fixed only after its expiration. Until expiration, it confers no vested right whatever upon the inmate.

It is only where a measure of liberty, in the form of parole, has actually been granted and some sort of "right" to its continuance becomes "vested" that the authorities have even hinted at the applicability of due process to the termination of that liberty.

There are federal cases, *e.g., Hyser v. Reed,* 318 F.2d 225 (D.C. Cir. 1963), recognizing the existence of certain procedural rights on the part of federal parolees in connection with the revocation of parole following release, but these rights are recognized as largely, if not entirely, statutory. In addition, some cases, *e.g., Boddie v. Weakley,* 356 F.2d 242 (4th Cir. 1966), have language arguably indicating that procedural rights at parole revocation have constitutional roots. In the instant case, we deal with term refixing. Its closest analog in the federal system is a revocation of parole before release thereon. Distinguishing between pre- and post-release parole revocation, the courts have held that the latter resides within the absolute discretion of the United States Parole Board, which may revoke parole prior to release thereon without notice, hearing, or cause. *See Koptik v. Chappell,* 321 F.2d 388 (D.C. Cir. 1963); *United States ex rel. Mitchell v. Shuttleworth,* 106 F. Supp. 1013 (N.D. Fla. 1952). The same conclusion has, of course, been reached by the federal courts with respect to state

pre-release parole revocations. *See United States ex rel. Foley v. Ragen,* 143 F.2d 774 (7th Cir. 1944); *United States ex rel. Harris v. Ragen,* 81 F. Supp. 608 (N.D. Ill.), *aff'd,* 177 F.2d 303 (1949); *United States ex rel. Lashbrook v. Sullivan,* 55 F. Supp. 548 (E.D. Ill. 1944).[9] *Cf. Escoe v. Zerbst,* 295 U.S. 490 (1935), in which this court stated that there is no constitutional right to notice and hearing at revocation of probation.

And in determining the alleged applicability of due process to the procedure of refixing a prison term prior to its expiration and prior to release on parole, it must be remembered that these procedures have been authoritatively characterized as purely administrative. "The proceedings of the Adult Authority are wholly administrative in nature, and that agency's determination of length or conditions of parole is not a judicial act." *In re Schoengarth,* 66 Cal.2d 295, 304, 425 P.2d 200, 57 Cal. Rptr. 600 (1967). As phrased somewhat more elaborately by a federal court, "The administration of the parole law is the exercise, through the Administrative Department, of the state's power to keep safely, supervise and discipline its prisoners. Such powers are not judicial but are matters of 'prison discipline.'" *United States ex rel. Lashbrook v. Sullivan, supra,* at 550.

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[9]The federal cases arising under Illinois procedures are ostensibly based, at least in part, on the fact that under Illinois law, the parole board is without authority to fix an indeterminate sentence. The California Adult Authority is for all practical purposes in the same position, for, as pointed out earlier, it has no power to make a permanent and binding determination of sentence prior to the actual expiration of a term which it has fixed.

In deciding when, and under what conditions, if any, to release an imprisoned felon, parole boards have the enormous responsibility of exercising a delicate judgment as to the extent of the individual's rehabilitation and the probability of his being a danger neither to himself nor others if allowed into the community at large. Although the California Adult Authority has voluntarily imposed upon itself regulations which provide procedural safeguards to the prisoners concerned, which could possibly interfere with the full exercise of its expert discretion, we suggest that this discretion is too important to be hobbled by procedural gamesmanship. We respectfully submit that under reason and authority, the actions of parole boards in determining whether to change their minds about a tentatively-fixed prison term are not subject to constitutional strictures.

III

THE FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY PRESENTS NO BAR TO THE REFIXING OF A TENTATIVELY-DETERMINED PRISON TERM UNDER THE CALIFORNIA INDETERMINATE SENTENCE LAW.

Petitioner's final contention is that the refixing of his term by the Adult Authority, after it had once been tentatively fixed, was absolutely barred by the jeopardy provisions of the Fifth Amendment, as applied to the states through the Fourteenth Amendment. Since there is no dispute that petitioner's term was indeed refixed, we will meet this argument on its merits.

This contention has been made before, and rejected, most recently and trenchantly by Justice Tobriner of the California Supreme Court in *People v. Dorado*, 62 Cal.2d 338, 360, 398 P.2d 361, 42 Cal. Rptr. 169 (1965);

> "Finally, the action of the Adult Authority in refixing sentences and perhaps increasing their length does not constitute double jeopardy. To support his contrary contention, defendant cites the cases of *United States v. Benz* (1931) 282 U.S. 304 [51 S.Ct. 113, 75 L.Ed. 354], and *Ex parte Lange* (1873) 85 U.S. (18 Wall.) 163 [21 L.Ed. 872], but these cases hold only that a *court of record* may not increase a penalty already imposed without unconstitutionally subjecting the defendant to double jeopardy." [Emphasis in original.]

Granting that double jeopardy forbids a court to increase a sentence once imposed, considered to be permanent, and on which service has begun, it is an utter *non sequitur* to claim that double jeopardy is violated when the Adult Authority reconsiders a tentatively-fixed term and resets it at maximum. Petitioner claims that "the reality for constitutional purposes" of Adult Authority actions, rather than their characterization under state law, is the determinative factor in judging the constitutional validity of the Authority's actions. We fully agree. And "the reality for constitutional purposes" of the Adult Authority's setting and resetting of prison terms is that these actions do not amount to sentencing in any constitutional sense. As explained in more detail *supra*, when

a California judge sentences a convicted felon to prison for the term prescribed by law, the sentence is one for the maximum period of time specified in the statute governing the offense of which the felon was convicted. It remains a sentence for the maximum term until and unless the Adult Authority elects to fix it at a shorter period. By the nature of the law governing the Adult Authority, it has no power to make a permanent determination of sentence. Any determination it makes is necessarily tentative, until and unless the term expires without having been reset. Since only after expiration of the term does the order fixing the term become permanent, only an attempt to refix a term after its expiration could even arguably be barred by the double jeopardy provisions of the Fifth and Fourteenth Amendments.[10]

Equating a tentatively-fixed prison term under an indeterminate sentence law with the kind of judicially fixed sentence imposed by a court would be a pure legal fiction. Moreover, it would fail utterly to take account of the purposes of the indeterminate sentence

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[10]In the instant case, petitioner was given a sentence of five years to life on each of two counts, the sentences to run consecutively. Between five and ten years following the commencement of his sentences, they were each set at five years, to run consecutively. Subsequently, and before the expiration of the sentences, they were both fixed at life. Arguably, the first consecutive sentence had expired prior to rescission of the order fixing term, and petitioner could claim a violation of double jeopardy in its redetermination. However, such a claim would be wholly moot, since the second consecutive, identical, five-year-to-life sentence had not expired at the time of its redetermination, and petitioner is therefore validly confined on at least one life sentence. As a matter of California law, moreover, neither of two consecutive sentences expires until both have expired. 19 Ops. Cal. Atty. Gen. 23 (1952).

law, the first and foremost of which is to facilitate rehabilitation and allow the California Adult Authority to determine and redetermine from time to time the readiness of an individual prisoner to return to society. This system is vastly superior to one in which the judge is obliged, armed with only the information concerning a convicted felon available at and shortly after his trial, to attempt to forecast in how many years the individual will be amenable to release. One of the Adult Authority's tools for the facilitation of rehabilitation is the tentative fixing of a term. When the Authority tentatively fixes a term, it in effect tells the subject prisoner that he will be given his freedom at a certain period of time if he behaves himself in the interim, and if there are no indications that he is not actually fit for release. This purely conditional promise gives the inmate a goal to work toward, and encourages him to conduct himself in a manner demonstrating his readiness to be returned to society. We cannot believe that the Constitution forbids the Adult Authority to make such a tentative promise.

What would be a practical result of a holding that the double jeopardy provisions of the Constitution preclude the Adult Authority's refixing a tentatively-determined prison term? The answer is that, under such a holding, the Adult Authority would decline to fix any prison term at less than maximum until and unless it was certain that the individual involved had at the time of the Authority's consideration of his case, manifested no further need for incarceration or

parole supervision. To fix a term at less than maximum prior to the acquisition of such knowledge by the Adult Authority would be a manifest dereliction of duty on the Authority's part, since it would be forbidden to reconsider its determination, once made, however clear it may become from subsequent events that the initial determination of an individual's term at less than maximum was in error. Prisoners would be deprived of the conditional promise that good behavior would result in their release by a certain date. Morale among prisoners would plummet and the Adult Authority would be deprived of an effective tool to facilitate rehabilitation. In applying double jeopardy to the sentence-redetermination procedures of the Adult Authority under the California indeterminate sentence law, this Court would be conferring a short-term windfall upon prisoners whose terms have already been fixed at less than maximum, at the expense of countless other prisoners who would be deprived of the benefits of a shortened sentence in the future.

The proposition that the double jeopardy clause, insofar as it forbids increase of a sentence already begun to be served, should be strictly limited to judicial increases in sentence is of historical validity and logically sound. It does not offend the intent of the Framers, who did not contemplate the refinements of 20th Century penology. To broaden the scope of double jeopardy, and apply it beyond the realm of judicial increase of sentence, would render unworkable many of the penological improvements of modern

civilization. For example it has been consistently held that the imposition of a sentence even by a judge, following revocation of probation does not constitute double jeopardy. *E.g., United States v. Huggins,* 184 F.2d 866 (7th Cir. 1950). A holding to the contrary would instantly render wholly inoperable any system of probation. There is a precise analogy between the state and federal systems of probation and the operation of the California indeterminate sentence law. When the California Adult Authority tentatively fixes a term, it effectively informs the prisoner whose term is so fixed that he is on probation, and if he maintains good behavior and otherwise does not give cause for his continued incarceration, will be allowed his freedom on a day certain. The Constitution no more prohibits a "revocation" of such "probation" by the Adult Authority than it prohibits a judge from revoking probation and imposing a sentence.

This Court has, of course, recently held that the double jeopardy provisions of the Fifth Amendment are applicable to the states through the Fourteenth Amendment. *Benton v. Maryland,* 89 S. Ct. 2056 (1960). At the same time, the Court held that the double jeopardy clause itself imposes no bar whatever to the imposition, following retrial after a successful attack on a conviction, of a longer sentence than that originally imposed under the first conviction. The Due Process Clause, however, forbids such imposition of a longer sentence without cause, or its punishment for a successful attack on an original conviction, but

does not prevent the imposition of a longer sentence for good cause, including the defendant's prison record established during service of the first sentence. *North Carolina v. Pearce,* 89 S.Ct. 2072, 2079 (1969). We submit that the *Pearce* case itself effectively answers petitioner's contentions. If a court can, upon retrial after successful attack upon a conviction, impose a longer sentence than that originally suffered on the basis of the defendant's prison record, *a fortiori* the California Adult Authority may, on the basis of a prisoner's prison record, reconsider a tentative determination of his term at less than the maximum allowed by law.

CONCLUSION

For the foregoing reasons, we respectfully submit that the order of the District Court denying the petition for a writ of habeas corpus and the order of Chief Judge Chambers declining to issue a certificate of probable cause to review that denial should be affirmed.

Dated, San Francisco, California,
September 5, 1969.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,

ARLO E. SMITH,
Chief Assistant Attorney General,

GEORGE R. NOCK,
Deputy Attorney General,

Attorneys for Respondents.

(Exhibits Follow)

Exhibit A

Date December 18, 1960

Notice of Complaint To

Conway	A-20630
(Name)	(Number)

1. You are hereby notified that a written complaint has been filed against you. A copy of the complaint is attached hereto or the charge(s) against you listed hereon.

2. A hearing on the charge (s) will be held at Disciplinary Committee Meeting Room Isolation Unit on the 20th day of December 1960, or as soon thereafter as the matter can be heard.

3. At that time, the Adult Authority or its representative committee of prison officials, as provided by the California Penal Code and Adult Authority Resolutions, will conduct a hearing to determine your guilt or innocence, and, when applicable, a determination will be made regarding:

(a) Revocation of parole (Sec. 3060 P.C.)

(b) Forfeiture of credits (Sec. 2923 P.C.)

(c) Refixing of term (Sec. 3020 P.C.)

Charge (s)

D-1201 Inmate's Behavior

(signature illegible)
California Adult Authority
Classification and Parole Representative

I hereby acknowledge receipt of a copy of the com-

plaint specified above or attached hereto and a copy of the foregoing notice of hearing.

Dated December 18, 1960. A-20630

(signature illegible)

(Number) (Name)

Notice to Parole Violators: By virtue of Adult Authority Resolutions when parolees are suspended, terms are refixed at the maximum, and, on commitments received prior to January 1, 1948, credits for the semi-annual period are disallowed.

Exhibit B

Department of Correction
Report of Violation of Institution Rules
San Quentin Prison
(Institution)

To the Warden

I, Officer H. A. Tabash, hereby charge Conway A-20630 with violation of Institution rules and regulations, Inmates Behavior (Fighting) D-1201 on or about Sat. Dec. 17, 1960 2:55 PM, the circumstances of which are as follows: D-1201 Inmates Behavior (Fighting with A-56505 Mathews.)

At approximately 3:00 P.M. Sat. Dec. 17, 1960, the writer observed inmate Conway and inmate Mathews A-56505, grappling with one another in the Main Yard. Inmate Mathews was noticed to be bleeding from his mouth. The writer shouted twice before the inmates heard me, and were broken up by the writer. Inmate Conway made the statement at the scene of the incident, that Mathews had taken his dominoes, and had refused to give them back, and was throwing them into the drain ditch. Inmate Mathews was quiet and cooperative after the incident. Inmate Conway was more concerned about loosing his dominoes and was reluctant to go to the Yard Office, before he could retrieve his dominoes. The dominoes were retrieved and placed in the South Block property room for Conway. Conway was checked at the Hospital and no apparent injuries noted, Mathews was left at the

Hospital for first aid for a cut lip. Both inmates were medically cleared and placed in a holding cell. Subject was informed of the CDC-115

H. A. Tabash (Reporting Employee)
Post .....

Custody Close (illegible)

Plea, Findings and Disposition 12/20/60

Plea: Guilty ..... Not Guilty X Prior Violations 39
Condition of Health App. Good

Findings: Plead not guilty. Claims had Mathews by the arm. Denies striking Mathews. Claims not fighting. Guilty.

Disposition: Found guilty: 3 day isolation

Rx postpone A.A. appearance to 6-61

Approved: Dale B. Frady (Warden-Superintendent)

Action taken by: (illegible), Hocher, (illegible)

Offense: A—D X M— Photos..... Injuries: Inmate.....
.....Employee.....

Estimated Cost of Damage .....

Estimated Cost of Control .....

Exhibit C

Recommendations of Disciplinary Committee and Adult Authority Action

Name: Conway, James Number A20630 (#114-2/61R)

Date Received: 3/14/52

Crime: Robbery 1st 2 counts CS

Previous Actions: 1/29/59 TFA 5 years each on 2 counts CS. Parole Denied. PP to 2/60 calendar

2/4/60 FPC pp 1 year.

Discharge Date: 3/14/62 Parole Date:

Earnings Subject to Forfeiture:

Credits Subject to Forfeiture:

Date of Infraction: 12/17/60

Charge: D1201. Inmates Behavior (Fighting with A 56505-Mathews)
(CDC-115 Attached)

Plea: Not guilty

Findings: Guilty. Claims had Mathews by the arm. Denies striking Mathews. Claims not fighting.

Disciplinary Action: 3 days isolation

Recommendation: Postpone AA appearance to 6/61

Action of Adult Authority:
Place on June 1961 Calendar (Disciplinary 12/17/60)
(illegible) Dec 29, 1960

Exhibit D

State of California
Youth and Adult Corrections Agency
Adult Authority

Meeting of December 29, 1960 held at San Quentin

Excerpt from minutes of meeting held on the above date from official records on file in the office of the Administrative Officer at Sacramento, California:

To Whom It May Concern:

Present were: John G. Bell, Member; James G. Hutton, Adult Authority Hearing Representative; Actions reviewed and concurred in by: Cletus J. Fitzharris, Vice-Chairman.

Order of the Adult Authority Relative to Reports and Recommendations Submitted by Disciplinary Committee or Disciplinary Officers

It Appearing That the following named and numbered inmates having been duly charged with violation of prison rules and regulations, and having been served with written copy thereof and the matter having been referred to the disciplinary committee, established pursuant to Resolution No. 86, as adopted on July 12, 1946, and with reference to Resolution No. 184, (reissued on May 11, 1956) and it appearing that a hearing was held on said charges and the committee having considered each case, finds that the following named and numbered inmates have violated the rules

and regulations of the prison, as set forth in the disciplinary committee's reports which are made a part of the following order of the Adult Authority by reference and the findings herein constitute the reasons therefore in the manner hereinbelow set forth opposite the inmates' respective names:

A-20630	Conway	Infraction—Fighting with A-56505 Mathews—12-17-60. Place on June, 1961 Calendar.

Adopted by the affirmative votes of: John G. Bell, Member; James G. Hutton, Adult Authority Hearing Representative; Actions reviewed and concurred in by: Cletus J. Fitzharris, Vice-Chairman

(Signed) J. R. O'Brien, Classification & Parole Representative

Attest

December 29, 1960

Attest August 25, 1969

/s/ Joseph A. Spangler

Joseph A. Spangler

Exhibit E

Resolution No. 216

Adopted: June 5, 1964

Resolution of the Adult Authority

Subject: *Disciplinary Infractions and Incident Reports*

Whereas, Section 2081.5 of the Penal Code stipulates that the Director of Corrections shall keep complete case records of all prisoners under custody of the department, which records shall be made available to the Adult Authority at such times and in such form as the Adult Authority may prescribe, and

Whereas, Section 2651 of the Penal Code stipulates that any authorization of punishment by the Director of Corrections shall not be construed as a limitation or impairment of the authority of the Adult Authority in exercising its functions, and

Whereas, the Adult Authority feels it is desirable to eliminate all possible inequities in the handling of disciplinary infractions, and to intensify the practice of individualized evaluation of infractions based on the inmate's total record and

Whereas, the foregoing procedures have been reviewed by the Director of Corrections and have received an affirmative recommendation;

Now, Therefore, Be It Resolved: that all Disciplinary Reports and/or Incident Reports involving Adult Male Inmates committed to the Department of Corrections under the provisions of Section 1168 of the

penal code shall be reported to the Adult Authority in a manner and at such times as indicated below:

I. Disciplinary infractions reported on CDC Forms #115 and/or Incident Reports involving an inmate who does not have a parole date and/or whose term has not been fixed at less than the maximum.

A. A report of all disciplinary actions will be presented to the Adult Authority as an integral part of the Adult Authority Pre-Board Report in the manner mutually agreed upon by the Adult Authority and the Director of Corrections.

B. A copy of all Disciplinary Reports and/or Incident Reports pertaining to an inmate which involves any infraction of the Rules and Regulations of the Department of Corrections or any incident which occurred subsequent to his reception on his current commitment, to the last Adult Authority calendar appearance of the inmate, or to his return to prison as a parole violator, whichever was most recent, will be included in the addenda material presented to the Adult Authority during regular calendar appearances.

II. Disciplinary infractions reported on CDC Form #115 and/or Incident Reports involving inmates who are on a credit earning basis, or whose terms have been fixed or refixed at less than the maximum, and/or who have been

granted a parole release date; excepting those disciplinary cases who have been considered by the Disciplinary Committee and found "Not Guilty".

A. Prior to release of the respective inmate on parole, a copy of the Disciplinary Report and/or Incident Report, shall be presented to an Adult Authority Member, or forwarded to the Adult Authority Headquarters in Sacramento in accordance with established procedures to determine whether the inmate may be released on parole or whether the case should be placed on the Special Proceedings Calendar for review by an Adult Authority Panel.

B. The signature of any Adult Authority Member indicating such a Disciplinary Action or Incident Report has been "Noted" will be sufficient authority for the release of the respective inmate on parole in accordance with the existing Determination of the Adult Authority.

C. Whenever a case is placed on the Special Proceedings Calendar, any parole release date will be automatically held in abeyance until a further Determination is made in the case.

D. Disciplinary Reports or Incident Reports involving inmates who have had their terms fixed at less than the maximum with no fur-

ther parole consideration will be referred to an Adult Authority Member, or forwarded to the Adult Authority Headquarters in Sacramento in accordance with established procedures to determine whether the case should be placed on the Special Proceedings Calendar for review by an Adult Authority Panel; provided, however, that no inmate shall be retained in prison beyond his scheduled Discharge Date unless the Determination fixing the term has been amended or rescinded by a panel of two Members of the Adult Authority.

E. Determinations made by individual Adult Authority Members with regard to cases involving either Disciplinary Actions or Incident Reports which are either "Noted" or placed on the Special Proceedings Calendar will not be recorded in the Adult Authority Minutes.

F. In all cases of inmates who are on a credit earning basis and who are found guilty of infractions of the Rules of the Director of Corrections or the Wardens and Superintendents of the California State Prisons by the Disciplinary Committee, the Disciplinary Committee shall include a recommendation as to whether or not credits should be disallowed or forfeited.

G. Institution Staff Members are requested to make any recommendations with regard to

Disciplinary actions they may deem desirable subject to Departmental Policy.

H. Normally, the Adult Authority will not take any final Determinative Action Rescinding either a parole date or a term fix unless the respective inmate has been given a personal appearance hearing by a panel of the Adult Authority.

Be It Further Resolved that the official minute sheets of the Adult Authority (CDC Form 244) shall identify all actions taken by the Adult Authority in conformity with this resolution by inserting the following introductory paragraph:

"Order of the Adult Authority Relative to Reports and Recommendations Submitted by Disciplinary Committee or Disciplinary Officer

It Appearing That The following named and numbered inmates, having been duly charged with violation of prison rules and regulations, and having been served with a written copy thereof, and the matter having been referred to the disciplinary committee established pursuant to Adult Authority Resolution #86, and it appearing that a hearing was held on said charges, and the Committee having considered the case, finds that the following named and numbered inmates have violated the rules and regulations of the prison; the following orders of the Adult Authority are made for the reasons set forth in the disciplinary report referred thereto:"

Be It Further Resolved that Resolution No. 48, adopted January 2, 1945, and Resolution No. 216A, adopted May 11, 1956, are hereby rescinded provided, however, that all actions taken by the Adult Authority pursuant to those resolutions shall remain in full force and effect, unless otherwise abrogated; it being understood that the provisions of the resolution shall take effect upon September 1, 1964.

Adopted by the affirmative votes of:

/s/ Arthur L. Alarcon
Arthur L. Alarcon, Chairman

/s/ John W. Brewer
John W. Brewer, Member

/s/ Abelicio Chavez,
Abelicio Chavez, Member

/s/ Fred R. Dickson
Fred R. Dickson, Vice Chairman

/s/ John G. Bell
John G. Bell, Member

/s/ Harry M. Kamp
Dr. Harry M. Kamp, Member

/s/ William H. Madden
William H. Madden, Member

Attest:
Date: June 8, 1964
Joseph A. Spangler
Administrative Officer

Exhibit F

Resolution No. 216-A
Adopted: May 11, 1956

Resolution of the Adult Authority

Subject: *Record of Disciplinary Infractions and Recommendations of Disciplinary Committee* (Revision)

Be It Resolved, that Resolution No. 216, adopted September 9, 1953, and revised March 3, 1954, be amended in its entirety to read as follows:

Whereas, Section 2081.5 was added to the Penal Code at the 1953 Legislative Session, stipulating that the Director of Corrections shall keep complete case records of all adult male felons committed to the Director, which records shall be made available to the Adult Authority at such times and in such form as the Adult Authority may prescribe, and

Whereas, Section 2651 of the Penal Code was amended at the 1953 Legislative Session, stipulating that any authorization of punishment for disciplinary infractions of inmates by the Director of Corrections shall not be construed as a limitation or impairment of the authority of the Adult Authority in exercising its functions, and

Whereas, Sections 2789, 2921, and 2922 of the Penal Code, relating to the authority of the Adult Authority to increase good time allowance to inmates and placing certain limitations on such authority, were

repealed at the 1953 Legislative Session, effective September 9, 1953;

Now, Therefore, Be It Resolved, that where adult male inmates, who are on a credit-earning basis or who have had terms fixed or refixed or parole release dates granted, are found guilty of infraction of the prison rules by the Disciplinary Committee, the Disciplinary Committee shall submit a report of each such case to the Adult Authority and the report shall contain a recommendation as to whether or not credits should be disallowed or forfeited or the previous action fixing or refixing the term and/or granting parole should be rescinded, as the case may be. Such reports shall be submitted each month as Special Proceedings to the Adult Authority for whatever action the Adult Authority may deem advisable; and

Be It Further Resolved, that where adult male inmates are found guilty of serious infraction of the prison rules by the Disciplinary Committee within six months of their respective hearing dates or next subsequent appearance date before the Adult Authority, such cases shall be reviewed by the Disciplinary Committee and a report shall be submitted to the Adult Authority by the Disciplinary Committee in each case and the report shall contain a recommendation as to whether or not the hearing of the case should be postponed six months or longer from the date of said infraction of the prison rules; and

Be It Further Resolved, that where adult male inmates, who have been granted a discharge date with

no further parole consideration, or who have a parole release date, are charged with any infraction of the prison rules and such charges are *not* referred to or heard by the Disciplinary Committee but are heard by a Disciplinary Officer, the disciplinary report shall be submitted to the Adult Authority as a Special Proceedings, for whatever action the Adult Authority may deem advisable.

Be It Further Resolved, that the official minute sheets of the Adult Authority (CDC Form 244) shall identify all actions taken by the Adult Authority in conformity with this resolution, by inserting therein the following introductory paragraph:

Order of the Adult Authority Relative to Reports and Recommendations Submitted by Disciplinary Committee or Disciplinary Officer

It Appearing That The following named and numbered inmates, having been duly charged with violation of prison rules and regulations, and having been served with a written copy thereof and the matter having been referred to the disciplinary committee, established pursuant to Resolution No. 86, as adopted on July 12, 1946, and with reference to Resolution No. 184, (reissued on May 11, 1956) and it appearing that a hearing was held on said charges and the committee having considered each case, finds that the following named and numbered inmates have violated the prison rules and regulations, as set forth in the disciplinary committee's reports which are made a part of the following orders of the Adult Authority by reference and the findings therein constitute the

reasons therefor in the manner hereinbelow set forth opposite the inmates' respective names:

Be It Further Resolved, that this Resolution shall become effective immediately, and that Resolution No. 216, adopted on September 9, 1953, and amended on March 3, 1954, relating to the same subject matter, shall be and is hereby rescinded;

Be It Further Resolved, that nothing in this Resolution shall abrogate or nullify the provisions of former Resolution No. 216, rescinding Resolutions Nos. 8, 80, 95, 100, and 149, which rescissions, having taken effect on September 9, 1953, are to remain in full force and effect.

Adopted By the affirmative votes of

/s/ Ervis W. Lester
Ervis W. Lester, Chairman

/s/ James D. Tante
James D. Tante, Member

/s/ Fred Finsley
Fred Finsley, Member

/s/ Everette M. Porter
Everette M. Porter, Member

/s/ Clinton T. Duffy
Clinton T. Duffy, Member

/s/ Cletus J. Fitzharris
Cletus J. Fitzharris, Member

Attest:
Date:

Rescinded by # 216 dated 6-5-64

E. A. Burkhart, Executive Secretary